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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 956

JULIUS GRIECO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

FRANK W. OLIVER
77 W. Washington Street
Chicago 2, Illinois
Attorney for Petitioner

UNITED STATES LAW PRINTING CO., CHICAGO 18, ILL. LA Review 5-6581

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Julius Grieco, respectfully prays that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit entered on January 11, 1962.

OPINIONS FROM COURTS BELOW

The United States Court of Appeals for the Seventh Circuit affirmed petitioner's conviction on January 11, 1962. The Opinion has not as yet been reported. It is printed with this petition as Appendix A.

The opinion sought to be reviewed by certiorari, is the subject matter of the petitions for certiorari filed in this court by petitioners Abbrescia and Doran, numbered 716 and 895, respectively. Appendix C to this petition is the certificate of the Clerk of the Court of Appeals that the record filed on behalf of petitioner Abbrescia is the same record relied upon by petitioner Grieco before the Court of Appeals. Petitioner Grieco would be understood as adopting matters of record filed with this court by petitioners Abbrescia and Doran, as well as those portions of the record supplied by respondent United States in the Abbrescia and Doran matters.

JURISDICTIONAL STATEMENT

Your petitioner was found guilty by a jury in the United States District Court for the Northern District of Illinois on April 1, 1960. The judgment entered on the verdict on April 28, 1960, sentenced petitioner to fifteen years in the penitentiary. The United States Court of Appeals for the Seventh Circuit affirmed the trial court on January 11, 1962.

On March 26, 1962 your petitioner's petition for rehearing was denied by the United States Court of Appeals for the Seventh Circuit. On April 18, 1962 this Court entered an Order extending petitioner's time within which to petition for certiorari to and including May 10, 1962.

The jurisdiction of this Court is invoked under Section 1254(1), Title 28, United States Code.

QUESTIONS PRESENTED FOR REVIEW

1. Can a defendant be convicted of the offense of conspiracy without having been charged in the indictment with that offense?

Assuming that one can be convicted of the offense of conspiracy without having been charged with its commission in an indictment (in apparent violation of the Fifth and Sixth Amendments to the Constitution of the United States) can that conviction be affirmed in the absence of instructions defining that offense of which one is convicted, though not charged?

Assuming that one can properly be convicted of an offense not charged, and in the absence of instructions defining that offense, is it error for the trial court to admit, upon the trial of a 40 count indictment in which the affected party is charged in 10 counts, all evidence of all acts and declarations of six codefendants against him: (a) notwithstanding his absence at the time of such acts or declarations, (b) notwithstanding such acts or declarations were not made or done in furtherance of any charge in the indictment, and (c) notwithstanding such acts and declarations were, in many instances, incriminatory declarations to federal agents, made up to one and one-half years after the termination of any offense alleged in the indictment, including dates subsequent to the return of the indictment?

Assuming all of the foregoing can take place properly, were such matters properly introduced against a party on the theory of the trial court that they were admissible on the ground that what was before the court was a "sweeping dragnet of a scheme and conspiracy?"

Assuming the foregoing to be improper, has a party been deprived of his right to judicial review when an appellate court declines to take cognizance of them upon appeal?

2. May the government falsify a trial court record by causing it to be changed by the trial judge subsequent to docketing on appeal, so that it is made to appear in the record in the appellate court that events occurred in the trial of the cause which in fact did not occur in the trial?

May the government thereafter embellish the exhibits previously certified to and filed in the Court of Appeals by inserting explanatory messages to the court among the exhibits?

May the government further falsify the content of the record in the Court of Appeals in defending against an appeal, by falsely claiming fictitious endorsements appeared on checks admitted into evidence, when in fact no endorsement on any check was shown to be other than genuine?

May the government further falsify the record on appeal by claiming in the Court of Appeals that a check was in the handwriting of a defendant, having admitted in the trial court that it lacked such proof?

May the government further falsify the record in the Court of Appeals by filing a booklet purporting accurately to describe exhibits previously certified to the appellate court, where the descriptions untruthfully portray the contents of such exhibits?

May the government misrepresent the charges of an indictment in the appellate court, so that the court is caused to affirm a man's conviction of offenses for which he was not indicted?

Assuming the foregoing to constitute flagrant improprieties, has an appellant been deprived of his right to judicial review when the appellate court declines in its opinion to take cognizance of such matters, though properly raised by the briefs?

3. Is it error to admit into evidence, over objection, enlargements or facsimiles of "count" documents where the original microfilm of which the facsimile or enlargement is a copy is not produced as required by statute?

Can the Court of Appeals properly refuse to review such actions by the trial court, although the matter is raised in the briefs?

4. Is it error for a trial judge to admit before the jury, over objection, evidence to the effect that a defendant charged with offenses having to do with fraudulently obtained and altered checks was questioned by an agent of the FBI concerning a forged check shortly before the date of any check upon which he is convicted, where the check about which he is questioned is never proved to have been forged and, for aught it appears, has nothing to do with any charge alleged in the indictment, and where it fails to appear that his relationship to the check about which he is questioned was anything but innocent?

Has such a defendant been deprived of his right to judicial review when the court of appeals declines to review his complaint in that connection although properly raised by his brief?

5. Is a jury adequately instructed as to interstate transportation of falsely altered securities, knowing them to have been altered, when the instructions are limited to reading the charge from the indictment, and reading the statute, where, in reading the statute, the trial judge deletes therefrom the statutory provision making knowledge of the falsely altered character of the securities an ingredient of the offense charged?.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Fifth Amendment to the Constitution of the United States.

2. Sixth Amendment to the Constitution of the United States.

3. Section 371, Title 18, United States Code.

4. Section 1341, Title 18, United States Code.

5. Section 2314, Title 18, United States Code.

6. Section 1732, Title 28, United States Code.

The pertinent provisions of the foregoing appear in Appendix B.

STATEMENT OF THE CASE

Petitioner Grieco was charged in ten counts of a forty-count indictment alleging, in the first six counts, six uses of the mail pursuant to a scheme to defraud in violation of Section 1341, Title 18, United States Code, and in Counts 7 through 40 the interstate transportation of falsely forged or altered checks in violation of Section 2314, Title 18, United States Code. Counts 3, 4, 5, and 23, charging Grieco, were dismissed in trial.

Grieco was convicted upon Counts 1, 2, and 6 (mail fraud) and Counts 38, 39, and 40 (interstate transportation of falsely altered checks). He was sentenced to concurrent five year terms on Counts 1, 2, and 6, and concurrent ten year terms on Counts 38, 39 and 40, the five and ten year terms running consecutively so that petitioner's effective sentence is fifteen years.

Because much of our complaint to this Court is predicated upon the failure or refusal of the Court of Appeals to review the matters brought before it, we have caused to be certified as part of our record in support of our petition for certiorari the briefs and appendices and exhibits filed below.

The Solicitor General, by the United States Attorney for the Northern District of Illinois, has moved for the certification of the stenographic transcript of proceedings to this Court.

References to the record as made in this petition are largely self explanatory. Appendix references are to the appendix (abstract) filed in the Court of Appeals. Similarly, references to briefs. References to appendices, this petition take the form: (Ptn. App. ..... p.).

The Mail Fraud "Scheme"

The mail fraud counts (1, 2 and 6) alleged generally that men visiting Chicago, were inveigled to the Show Lounge night club by cab drivers, where their subsequent intoxication rendered them compliant in signing checks; that these would be raised or used as patterns for forgery, the victim supposing them to have been destroyed. Such fraudulently obtained, forged, or altered instruments would then find their way via mail to the victims' bank accounts.

The government theorized that actions of individual defendants were restricted to one of three types:

Type I—Cab driver defendants Lo Celso and Di Domenico, were said to have lured victims to a night club, the "Show Lounge."

Type II—"Show Lounge" managers, defendants Doran and Abbrescia, were said to have obtained and mishandled the checks, as indicated.

Type III—Petitioner Grieco and defendants Harris and Schulman were said to have transmitted the checks to drawee banks. Forgeries supposedly moved via defendant Schulman, and altered checks via defendant Harris' account or petitioner Grieco's personal account or that of a shopping center he owned. Harris' account, and the Grieco and Shopping Center accounts were in the Merchants National Bank in Chicago.

Count 39, affirmed in the Court of Appeals, alleged interstate transportation of an altered check. The proof offered as to interstate transportation counts was in the same vein as that offered in the mail fraud counts.

• • •

EVIDENCE AS TO PETITIONER GRIECO

Evidence as to Grieco's participation in offenses was restricted to bank records, Grieco's ownership of the Shopping Center, his supposed ownership of the Show Lounge, and matters pertaining to the operation of the Shopping Center.

Bank Evidence:

Witness Daleiden, auditor of the Merchants National Bank in Chicago, stated that Exhibit 81, a signature card, related to a Mr. Grieco, the proprietor of the Shopping Center, whom witness did not know. He testified that Exhibits 101, 1201, 1401 and 1601 were charge back records (return item memos) relating to designated microfilm exhibits. He testified that upon dishonor by a drawee bank of a check deposited to a customer's account, Merchants Bank mailed a charge back record, together with a check, to the depositor (Appellant's Appendix 45-48).

FBI Agent Nehrbass testified that he had made prints from Merchants Bank microfilm (Recordak). He testified that he made Count Exhibit 1 from an unidentified film.

Nehrbass testified he made Exhibit 23 from bank film which was not in court.

Nehrbass testified that he made Count Exhibit 39 from Merchants Bank microfilm, but that he could not find the film among the exhibits, nor did he have such film. Similarly, Count Exhibit 40. He testified that he did not know if the originals of any of the Recordak checks had ever been in the Bank (Appellant's Appendix 48-50, 52-55).

[When the various photographic exhibits were offered into evidence, petitioner objected to insufficiency of foundation for admission of copies (Appellant's Appendix 159). All objections were overruled (Appellant's Appendix 161).]

Shopping Center Evidence:

Witness Bell of Dubl-Check Company installed a "bad check" device in Shopping Center that photographed checks and their negotiators when a dime was dropped in a box. The installation was made on October 6, 1956, and removed January 16, 1957, when the company felt that all checks were not processed per contract. Count Exhibit 1 was not processed through Bell's camera (Appellant's Appendix 100-102).

Witness Nehrbass testified that the Shopping Center was a large super market. (Appellant's Appendix 55) and witness Bell testified that the Shopping Center had a frontage of 80-100 ft. (Appellant's Appendix 101-102).

The Show Lounge Evidence:

Witness Medara, an exotic dancer, testified that Doran, petitioner Grieco's co-defendant, told her that Grieco owned the Show Lounge. The testimony was limited to Doran (Appellant's Appendix 112).

Witness Evelyn Neal, an exotic dancer, testified that Grieco owned the Show Lounge but that she did not know that of her own knowledge; that it was common knowledge and that she would not have known if people "hadn't of told" her. She saw Grieco in the Show Lounge on occasion as a customer (Appellant's Appendix 96).

FBI Agent Nehrbass said he overheard Abbrescia making a phone call [not claimed to be in furtherance of any offense] in which Abbrescia said to the other party to the call, "This is Donnie Abbrescia at the Show Lounge . . . you know, JuJu's place." Nehrbass then asked Abbrescia who owned the Show Lounge. Abbrescia said he, Abbrescia, did (Appellant's Appendix 137).

FBI Agent Jossy testified that he talked to Grieco on November 8, 1956, at the Shopping Center. Jossy had no checks with him, but asked Grieco about checks. Over objection the prosecutor elicited from the witness that the checks in question had been drawn on a Des Moines, Iowa bank, were forged and cashed in Chicago and had "bounced back" to Chicago. Grieco's motion for mis-trial was overruled. Jossy asked Grieco if he knew where they had come from. Grieco said he could not describe the person from whom he got them, that he cashed them, and that he did not know the endorser. Jossy said that Grieco could not furnish information assisting in his investigation. The motion to strike the testimony was overruled, as were motions for severance then made by Grieco's co-defendants (Appellant's Appendix 130-132).

• • •

Our review of the evidence is limited to the counts affirmed as to appellant, *viz.*, 1 and 39. Proof of Counts 2, 6, 38 and 40, not considered as to Grieco by the Court of Appeals in view of its ruling on Counts 1 and 39, entailed proof of no additional facts as to Grieco.

REASONS FOR GRANTING THE WRIT

I.

Petitioner was erroneously convicted, and that conviction erroneously affirmed, of the offense of conspiracy for which he was not indicted. No charge was given to the jury upon which it could have predicated a conspiracy verdict. On the erroneous notion that a conspiracy was charged, the trial judge admitted evidence of acts and declarations of co-defendants against petitioner, notwithstanding they occurred in his absence, were not made or done in furtherance of any charge in the indictment (including any supposed conspiracy charge) and notwithstanding such acts and declarations included, but were not limited to, incriminatory declarations by co-defendants made up to one and one-half years after the termination of any offense alleged in the indictment, including dates after the return of the indictment. All evidence and all exhibits were admitted against all defendants for all purposes, with no limitations, on the trial judge's view that before the court was "... the sweeping dragnet of a scheme and conspiracy ...."

The Court of Appeals and the trial court erred in considering the case to be a conspiracy case. In its opinion the Court of Appeals stated that Grieco was found guilty of *conspiring* to use the mails in a scheme to defraud (Ptn. App. A. p. 1) despite petitioner's efforts to convince that court that he was not *indicted* for conspiracy (Grieco Brief, pp. 24, 39). That the Court of Appeals proposed to be understood as regarding counts 1, 2 and 6 of the indictment as technical conspiracy counts is evidenced by the closing paragraph of the opinion where the

counts are again referred to as conspiracy counts, and where they are also further carefully distinguished from "substantive count 39." (Pltn. App. A, p. 8).

That the trial judge was similarly in error as to the nature of the offenses before him is evidenced by his frequent erroneous pronunciations, often in the presence of the jury, that the case on trial was a conspiracy case. *e.g.*, Appellant's Appendix 65, 81, 83, 95, 97, 99, 104, 145, 160, 161.

But Counts 1, 2, and 6 of the indictment charge *substantive* violations of the mail fraud statute, 18 U.S.C., Section 1341. (Appellants' Appendix 11,17, 20-21).

The record does not reveal whether the trial judge's error consisted in his failure to read the indictment correctly, his failure to read it at all, or in the fact that having read it with understanding he was thereafter misled as to its content by the prosecution.

That mail fraud, simply because it alleges a scheme, does not necessarily entail a conspiratorial agreement "between two or more persons" (18 U.S.C. § 371) is obvious from the fact that the use of the mails in a scheme to defraud is chargeable against a defendant acting alone, without the participation of other persons. Nevertheless, the trial judge and the Court of Appeals embraced the view that Section 1341, Title 18, proscribes a conspiracy, not a substantive offense.

In view of constitutional amendments protecting defendants from trial upon secret charges not returned by the only body entitled to make such charges, we hope we do not affront this court by alluding to the basic unfairness of the procedure. Obviously it is unfair to advise a jury that a defendant is on trial for offenses not charged.

Obviously one cannot prepare a defense to such charges in advance of trial. Obviously defense counsel is of necessity confounded in defending the case.

Evaluations of unfairness in the circumstances aside, the Fifth Amendment to the Constitution provides in relevant part:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury . . ."

Here no conspiracy indictment was returned. Yet appellant Grieco was put on trial for conspiracy. The Sixth Amendment to the Constitution of the United States, provides in relevant part,

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation . . ."

While it appears abundantly from the statements of the trial judge in the presence of the jury that a conspiracy was being tried, and from the holding of the Court of Appeals that petitioner was convicted of the offense of conspiracy, Grieco was tried without notice to him of that fact, in the form of a conspiracy indictment. He had supposed he was charged substantively.

Though only partially convinced of his conviction of conspiracy before reading the opinion of the Court of Appeals, petitioner Grieco, for the purpose of argument, must accept that fact thus far judicially established. A question now arises. "Can a conspiracy conviction be affirmed in the absence of any instructions to the jury as to the law of conspiracy?"

We understand the law to be that a trial court has a duty to charge the jury as to the elements of the offense, and that his failure to so charge constitutes plain error.

Screws v. *United States*, 325 U.S. 91, 107. *Morris* v. *United States*, 156 F. 2d 525, 527.

The trial judge failed to give any conspiracy definition to the jury (see Appellants' Appendix 164-173). Nowhere in the judge's charge does it appear that a conspiracy is an agreement between two or more persons to commit an offense against the United States, and involves the proof of an alleged overt act, itself proved to be in furtherance of the conspiracy and performed subsequent to that agreement, all of which Section 371, Title 18, United States Code, would seem to require.

Further, the trial judge permitted the jury to consider, without limitation, statements of co-defendants out of petitioner's presence.

In a thoroughly hazy instruction at Appellant's Appendix 171, the trial judge instructed the jury that under Counts 1, 2 and 6:

> "The . . . statements of one defendant, made out of the presence of the other defendants, is not binding upon other defendants, unless the evidence—not including any of such declarations, statements or conversations other than his own—shows, beyond a reasonable doubt, that such other defendant was a participant in the scheme to defraud . . . at the time of such declarations . . . and unless . . . the declarations were in furtherance of the scheme to defraud and made during its continuance."

We suppose that the trial judge hoped to convey the thought that statements of an alleged co-conspirator made in the absence of a defendant, might not be considered against the absent defendant unless the latter's own statements or acts established his membership in a conspiracy as a precondition to the consideration against him of matters occurring in his absence. We will not say the trial

judge did not so charge. We do not know. We think the instruction either says the opposite, or nothing, perhaps, at all. Substitution of "A's" and "B's" for indefinite referents provides no help.

This Court will also observe that any limitation drawn by the charge was restricted to counts 1, 2, and 6, and did not apply to counts 38, 39, and 40.

In any event the judge had previously charged the jury, at the time of the government's tender of evidence to and in the presence of the jury that:

> "That record may show that the same objections are allowed to stand as to the admission on the charge of conspiracy as heretofore made, and the objections will be overruled and the testimony and the exhibits are now allowed to stand as to all of the defendants except for . . . [written statements to the F.B.I. of defendants Harris and Abbrescia, Exhibits] 1110 and 1111" (Appellants' Appendix, 151).

Under that instruction, all exhibits and all testimony as to all 40 counts was admitted as to appellant Grieco as to every count on which he was charged, whether it was a "conspiracy" count or a substantive count. The excepted exhibits 1110 and 1111 were signed statements made by two of Grieco's co-defendants to federal agents. Under that ruling of the court, such miscellany was admitted as to appellant Grieco as Exhibits 961A and 961B, a co-defendant's fingerprint card; testimony as to co-defendant Doran's arrest in a brothel, apparently on a vice charge (Appellants' Appendix 99); witness Esther Vagt's understanding of the fraudulent scheme as attained from her reading of the newspapers (Appellants' Appendix 123-124); co-defendant Harris' admissions to FBI agent McGrail on June 9, 1959, a year and a half after the sup-

posed conspiracy ended and one day after the indictment was filed, that he cashed hundreds of dollars of checks for co-defendant Doran (Appellants' Appendix 134-5); co-defendant LoCelso's statement to FBI agent Nehrbass in March, 1958, three months after the termination of the supposed "conspiracy" that he had driven a victim to a house of prostitution (Appellants' Appendix 135); and co-defendant Shulman's statement to the F.B.I. in November, 1958, eleven months after the termination of the supposed conspiracy, that he had obtained some of the checks from one "Whitey," a hoodlum and racketeer whom Shulman feared (Appellants' Appendix 139).

At best, the instruction given the jury at the time of the tender of government evidence and the other, given at the time of the formal charge, were at war with one another. Even assuming the instruction in the formal charge to have been correct, the jury could not be required to elect between that and the patently erroneous charge at the time of the tender. *Bollenbach v. United States*, 326 U.S. 607, 613. And both, in so many words, required the jury to consider everything against petitioner on counts other than 1, 2, and 6.

We have not exhausted the matters improperly admitted as to petitioner Grieco by virtue of the trial judge's admission into evidence of all testimony and exhibits against Grieco, but have merely selected a few glaring examples of the prejudicial sort of matter thrown against petitioner on the theory that he was being tried for conspiracy. Indeed, the trial judge delivered himself of the view that so long as someone was faced with a conspiracy, everything was properly admissible against him, remarking in the course of the tender of the government's exhibits "we come again to the sweeping dragnet of a scheme and conspiracy . . ." (Appellants' Appendix 160).

This Court will observe no tender concern in the trial court that before statements or acts of co-defendants should bind defendants not present that:

(a) The existence of conspiracy must first have been shown. *Minner* v. *United States*, 57 F. 2d 506, 511; *Montford* v. *United States*, 200 F. 2d 759, 760.

(b) The connection of the defendant with such conspiracy by his own acts or statements must first have been shown, *Minner* v. *United States*, *supra*, 511; *Glasser* v. *United States*, 315 U.S. 60, 74; *Krulewitch* v. *United States*, 336 U.S. 440, 453.

Nor was the court concerned that even though such conditions be met, acts and statements could not be considered to bind an absent defendant:

(c) Unless such statements occurred during the existence of the supposed conspiracy *Krulewitch* v. *United States*, 336 U.S. 440, 442-3; *Lott* v. *United States*, 218 F. 2d 675, 681-2; and

(d) Unless such statements were made in furtherance of the objectives of the supposed conspiracy. *Krulewitch* v. *United States*, *supra*, pp. 443-4.

In *Blumenthal* v. *United States*, 332 U.S. 539, 551, this Court said:

> "If . . . it were . . . even doubtful that the admissions had been improperly received as against . . . [co-conspirators] . . . reversal would be required as to them."

In the case at bar, where admissions were made to FBI agents up to one and one-half years after the termination of the "conspiracy" said by the Court of Appeals to have been alleged in the first 6 counts, there can be no doubt that they were improperly received against all save their makers. For they could not have been in furtherance of

the supposed conspiracy, nor made during its existence. They were admitted against Grieco, together with Abbrescia's fingerprints and Doran's arrest in a brothel, wholly and entirely under the "sweeping dragnet" theory of the enforcement of the criminal code.

Where a defendant is tried and convicted of an offense as to which he was not charged, and where the Court of Appeals has affirmed that conviction and stated that petitioner was convicted of that offense, and where no instructions were given defining that offense, and where evidence is admitted on the theory that he is charged with that offense, and improperly admitted at that, *regardless* of the offense charged, and where all of the foregoing occur in violation of his Constitutional right to be indicted for the offense upon which he is tried, and in violation of his Constitutional right to be apprised of the offense for which he is to be tried; then, we respectfully submit, such a petitioner stands in a fair way of being able to complain of a failure of due process of law. And to complain that both the trial court and the Court of Appeals have so far departed from the accepted and usual course of proceedings, or have so far sanctioned such departure, as to call for an exercise of this court's supervisory powers.

II.

The prosecution in both the trial and appellate courts, falsified the content of the record. On appeal the prosecution further tampered with the record.

The Court of Appeals has both sanctioned a departure from the course of judicial proceedings by the trial court and has departed from accepted and usual standards of proceedings in its consideration of the case on appeal, such as to call for the exercise of this Court's supervisory powers.

A. Record tampering.

In its Opinion the Court of Appeals declined to consider the fact that the trial court record before it had been confounded by the prosecution. After the cause was docketed in the Court of Appeals, the government returned to the trial court, where, over defense objection, it succeeded in altering the trial transcript. The trial judge agreed that the transcript was true and correct before the alteration. It was certain that the transcript was false after the alteration. The prosecutor's statement to the trial judge, in seeking the alteration, was essentially this: The record as written showed what the prosecutor said at the time of the trial. However, he had *meant* something else. Accordingly, he asked that the transcript be changed to show, not what he had in fact said, but what he had meant to say.

The Court allowed the change (Appellants' Appendix 181-183).

We have caused to be transmitted to this Court the briefs filed by the parties in the Court of Appeals. In Petitioner Grieco's Brief he complained of this state of affairs (Grieco Brief 61). The change caused the record on appeal falsely to appear that exhibits which were neither offered nor received into evidence, but which nonetheless went to the jury, had in fact been offered and received into evidence. These exhibits consisted in an exhibit designated in trial as Exhibit 133-A, which the trial judge redesignated as 133-A-1 subsequent to docketing in the Court of Appeals, although no exhibit bearing number 133-A-1 was identified, offered, or received in the course of trial. The problem arose because after docketing, the government discovered that two exhibits had been marked 133-A and had gone to the jury under that designation, although but a single "133-A" had been offered. A second change was made

in the numbering of an exhibit identified as Exhibit 167, (Appellants' Appendix 101) which was not thereafter offered into evidence in the trial. Following docketing in the Court of Appeals, the government prevailed upon the trial judge to change the record so that wherever the prosecutor in trial had said "176", the number "167" should appear. Thus exhibit 167, which was neither offered nor received in trial, but which went to the jury, was made to appear in the record on appeal as having been offered and received.

But the tampering did not stop there. After the record was filed in the Court of Appeals, and after appellant's brief was filed, the prosecutor inserted explanatory notes into a volume of exhibits which had previously been certified to the Court of Appeals by the Clerk of the District Court. The exhibits have been certified to this Court. If furthering tampering has not occurred, your Honors will observe the slips in question at Pages 39 and 40 of Exhibit Volume II.

We respectfully urge that a litigant cannot properly make one record in the trial court, then have it changed to suit his convenience upon appeal. One of two results must ensue from such practice. Either the appellate tribunal must roundly denounce the practice and confirm in the disappointed litigant his right to file an untampered record, or the appellate tribunal must confirm in the government its "right" to cause an appellate record to reflect matters which did not occur.

It is not for us to say what an appellate tribunal should tolerate, but we do not hesitate to say that omission from the opinion of any mention of this aspect of the case will not tend to discourage further similar abuses.

B. Falsification in the trial court and in the Court of Appeals.

Not content with tampering with the record in the Court of Appeals, the government contrived to convince both the trial judge and the Court of Appeals that in extremely material particulars the record disclosed matters which the record failed to disclose.

1. Ownership of the "Show Lounge".

The court's opinion (Ptn. App. A., p. 4) recites "Grieco owned . . . the Show Lounge." The Court of Appeals was advised by the government in its Brief in answer to appellant Grieco of an "abundant indication from the record" of the interest of Grieco in the Show Lounge. That "abundant indication" took the form of a woman's statement that Grieco owned it (Appellants' Appendix 93), but that she did not have personal knowledge of his ownership, and would not have known if people "hadn't ot told" her (Appellants' Appendix 96). An FBI Agent further testified that in speaking to defendant Abbrescia, he overheard Abbrescia say on the telephone, not in furtherance of any scheme, "this is Donnie Abbrescia at the Show Lounge . . . you know JuJu's [Grieco's nickname] place." The agent then asked Abbrescia who owned the Show Lounge and Abbrescia stated that he did (Appellants' Appendix 137).

In the trial court, the government represented at one point that Grieco owned the Show Lounge (Appellants' Appendix 145) at another that Abbrescia owned it (Appellants' Appendix 149) and then hastened to advise the trial judge that the government did not contend that the Show Lounge had two or more owners but that Abbrescia's statement bound him to the extent that it related to the matters charged (Appellants' Appendix 145).

We think it intolerable that the prosecution should have adopted the position that it was not the case that both Abbrescia and Grieco owned the Show Lounge, yet that Grieco owned it to the extent that ownership was incriminatory of him, whereas Grieco did not own it and Abbrescia did own it, to the extent that such was incriminatory of Abbrescia. We do not know a rule of law which requires that a prosecutor not assert the simultaneous truth of two alternatives when he knows one of them is false. But we do know a rule of morality which forbids a prosecutor or anyone else to adopt such practices.

Regrettably, the Court of Appeals accepted at face value the government's claim that petitioner Grieco owned the Show Lounge.

2. Fictitious first endorsements.

Yet another example of the Court of Appeals' adoption of the government's false representations appears in its opinion (Ptn. App. A., p. 2). There, the opinion observes:

> "First endorsements were generally fictitious to give the appearance of genuineness and to conceal the culprits."

That contention was made by the government in its answering Grieco brief (page 4) in the following language, substantially adopted by the court:

> ". . . the majority of the checks . . . had the names of fictitious first endorsers in order to give the appearance of genuineness and to conceal the identities of the participants . . . "

In the trial court the government, in its tender of evidence, made a similar claim, referring to "the fictitious first endorsement which appeared on all the checks" (Appellants' Appendix 159).

The simple, unvarnished fact is, that there is not one word of evidence in the entire record that any check bore

a fictitious first endorsement. The government's claim to the contrary after the Grieco brief (pp. 36-7) pointed to the falsity of the assertion in the trial court, eliminates the possibility of innocent mistake in the government's brief on appeal. The claim is thus branded for what it is: An impudent fabrication.

The fictitious character of first endorsements was a matter of extreme importance to petitioner Grieco. His supposed role in the scheme was wilfully to act as a channel of negotiation for the checks referred to in the indictment. Obviously, fictitious first endorsements on the checks might have given notice to Grieco of infirmities in instruments that he or the Shopping Center accepted. The supposed proof of fictitious first endorsements was thus very damaging in the context of the case. The government by falsehood in both the trial court and Court of Appeals convinced those courts that it had established that damaging matter, yet *not one endorsement* was shown to have been other than genuine.

3. Misrepresentations as to the Bardin check.

As will appear hereafter, the Bardin check became, in the opinion of the Court of Appeals, essential to affirmance of the case against Grieco. For in its opinion the Court of Appeals uses the Bardin check as a springboard to show notice to Grieco of the fact that he was taking bad checks (Pt. App. A., pp. 4-5).

In its brief in answer to Grieco in the Court of Appeals the government stated (pp. 18-19) that Grieco deposited the check (Exhibit 23) in the Shopping Center account in Merchants Bank on September 21, 1956. This was a false assertion in three particulars. First, no evidence was offered as to who deposited it. Second, there was no evidence of any date of deposit. Third, there was no showing that it was deposited in the Merchants Bank.

The government also said in its Court of Appeals Grieco brief (p. 19) that the check was returned to the Shopping Center and that a charge was made against the Shopping Center account. This too, was a studied falsification of the record. The Court of Appeals adopted the government's thoroughly unwarranted claims, stating (Ptn. App. A., p. 4) that "Merchants National debited Shopping Center's account accordingly and notified it of the dishonor of the Bardin check." But no evidence was offered showing a debit to the account or notification of dishonor to Shopping Center. The Court of Appeals, apparently relying upon the good faith of the prosecutors, simply adopted their statements, unsupported by any record reference. For the reason that none exists.

But the government's misrepresentations as to the Bardin check did not stop there. The government claimed in the Court of Appeals that the jury was entitled to conclude that the handwriting of defendant Doran appeared on the check (Government Grieco Brief p. 19).

This too was a flagrant falsehood, and was known to be such by the government. For in the trial of the cause, the government dismissed indictment Count 23, relating to Bardin check, Exhibit 23, *on the ground that the government's own handwriting expert could not identify Exhibit 23 as being in Doran's hand.* (See original Transcript of Proceedings, page 2287).

Thus the government claimed in the Court of Appeals that Exhibit 23, the Bardin check, was a Doran check where the trial court record showed that the government knew, by its own expert, that it could not truthfully make that claim.

Shockingly, the government's perfidy in the Court of Appeals did not stop even there. The government filed in the Court of Appeals a document referred to as a

"Chronological Listing of Check Exhibits", a copy of which is certified to this Court. In that list of check exhibits, the government pretends to describe the endorsements on exhibits certified to the Court of Appeals. Bardin Check No. 23 is the first such exhibit listed and is to be found at page 1 of the document filed by the government. The government states in that chronological list that the following endorsements appear on the Bardin check, Exhibit 23: "Shopping Center;" "Merchants" [bank].

But the Merchant bank endorsement, essential to the government's claim that the check was transmitted through Merchants Bank, *does not appear on the exhibit.* (See Exhibit 23, Exhibits, Vol. 1, p. 23).

We have caused the Clerk of the Court of Appeals to transmit original exhibits to this Court in order that this Court may observe for itself the type of studied misrepresentation relied upon by the government in its quest for affirmance.

The importance of the government's misrepresentations as to Bardin Check 23 cannot be over-emphasized. For without those misrepresentations, the government's own evidence, under the government's own theory of the case, demonstrates that petitioner Grieco is in fact innocent.

The "scheme" supposedly spanned the period from September 1, 1956, to December 31, 1957. The only checks attributed to Grieco or Shopping Center handling, save for Bardin check Exhibit 23 dated September 21, 1956, bore dates within the twenty-eight day period between November 12 and December 10, 1956. The evidence was conclusive that not a single further check went through Grieco or Shopping Center subsequent to the time the bank was proved to have given notice that *any* check was bad. The first time the bank was shown to have sent such notice was

on December 11, 1956, which, allowing for mail delivery, could not have been received by Grieco or Shopping Center until December 12, two days after petitioner or Shopping Center was supposed to have accepted the *last* check.

Accordingly, it became essential for the prosecution to claim that Bardin exhibit 23 was returned dishonored before the commencement of the twenty eight day period between November 12 and December 10, 1956. We assume that that felt need accounts for the government's willingness to fabricate as "fact," matters tending to connect the exhibit with one of the defendants (Doran's handwriting conceded in trial not to be provable) and matters tending to show that the exhibit passed through the Shopping Center account in Merchants Bank (the claimed but non-existent "Merchants" endorsement on exhibit 23).

Having accepted the thoroughly false assurance of the prosecution that Bardin exhibit 23 was written in the hand of co-defendant Doran, and the equally false assurance that the Merchants endorsement appeared on the exhibit, we suppose that the Court of Appeals did not question the prosecution's other representations to the effect that the check was deposited by Grieco, was deposited in the Shopping Center account, was deposited on September 21, 1956, was returned to the Shopping Center, and that the account was debited accordingly. All without a single line of evidence.

Supplied thus with a "deposit" date for a check never shown to have been deposited, the Court of Appeals opined that the check would have been returned within eighty one days from its *North Carolina* drawee bank because another check, in no way related to Bardin Exhibit 23 was returned from a *New Jersey* drawee bank in eighteen days. Hence, reasoned the Court of Appeals, the check would have been returned to the Shopping Center in time to give notice

of bad checks to follow, and Grieco, as owner of Shopping Center "knew of [that] notice of the returned Bardin check and with that guilty knowledge endorsed the Wyman check." (Ptn. App. A., p. 5).

The government's theory, adopted by the Court of Appeals, attributed guilty knowledge to petitioner Grieco in that he or his Shopping Center accepted checks after one such check was returned dishonored. Rarely can a defendant establish not only that the prosecution has failed to prove him guilty, but has, under its own theory of guilt, proved him innocent. Just exactly that proof of innocence is available here.

Merchants banker Daleiden testified that upon dishonor and return of a check, a "charge back record" or "return item memo", together with the dishonored instrument, was mailed to the customer. (Appellants' Appendix 45-46). Bank copies of the return item memos were introduced into evidence in support of every check supposedly returned to the Shopping Center or Grieco, *except in the case of Bardin exhibit 23.* Those return item memo exhibits appear in the exhibit volumes (filed in this Court) as follows: Exhibits 101, 201, 1401, 1601 (Exhibits, Vol. 1, pp. 2, 3); Exhibit 124 (Exhibits, Vol. 1, p. 25). The first group of return memos bear bank dates December 11, 1956, the second, December 12, 1956. The *last* check charged to Grieco's handling was taken on December 10, 1956.

Thus, the record conclusively demonstrates that once notice was shown to have gone to Grieco or Shopping Center of the dishonor of *any* check, not a single additional check was taken, though the supposed scheme continued for another year.

This Court can now observe the importance of the Bardin check, Exhibit 23. It is the only check which *might* have been returned, and *might* have put Grieco on notice before he received other checks.

And thus your Honors are also in a position to see the vice in the government's misrepresentations as to the Bardin check. Without the government's misrepresentations, the Court of Appeals could not erroneously have assumed that the handwriting on the check was Doran's, that it bore a Merchants Bank endorsement, that it was returned to the Shopping Center, and that its return to the Shopping Center was brought to the attention of petitioner Grieco.

4. Misrepresentation to the Court of Appeals as to the indictment.

It is a lamentable fact that the opinion of the Court of Appeals reflects misstatements of the record urged by the government. But those misrepresentations relate not only to the factual basis for the affirmance of Grieco's conviction, but extend to misrepresentations as to the very nature of the charge itself. To gain admission for evidence in trial, it suited the government to claim that the defendants were indicted for conspiracy in the first six counts. In fact, no conspiracy was charged. Each of the forty counts sets forth a substantive offense. Yet the opinion recites that the offense charged was "conspiracy to use the mails in a scheme to defraud" (Ptn. App. A., page 1).

That the Court of Appeals was convinced, erroneously, that it was reviewing a conspiracy case as to the first six counts, and not substantive charges of mail fraud, is further evidenced by the cautious distinction drawn by the court between the "conspiracy counts 1, 2, 6" and "substantive count 39." (Ptn. App. A., page 8).

* * * * * *

It is not surprising that the Court of Appeals and the trial judge should have relied upon the federal prosecutors for a dispassionate and candid statement of the case. The

prosecutor's job, after all, is not merely to convict, but to see justice done. In general, the confidence of the courts in the office of the prosecutor is not misplaced. But that fact merely renders the abuse of that confidence more vicious.

From a reading of the opinion, one would suppose that we had never mentioned these matters in the Court of Appeals. Such is not the case. The issues were presented as forcefully as we knew how to present them. The Court of Appeals' rejection of our complaint without comment is unlikely to be forgotten if such tactics become necessary again in an effort to obtain affirmance of a conviction.

We respectfully urge that the Court of Appeals has unwittingly sanctioned the misrepresentations of the federal prosecutors in defending the appeal so as to deflect the accepted and usual course of judicial proceedings, calling for the exercise of this Court's supervisory powers.

III.

The Court of Appeals erroneously declined to consider the impropriety of the introduction into evidence of exhibits fundamental to affirmance of petitioner's conviction although petitioner complained they were improperly admitted copies in both trial and appellate courts.

The bulk of the exhibits admitted into evidence against petitioner consisted in secondary evidence—literally photographs of photographs—for the admission of which no foundation was laid. Timely objection was made to the introduction of exhibits which were copies (Appellants' Appendix 159). The "count" exhibits described in counts 1, 39 and 40 were themselves such exhibits, as was Exhibit 23, the Bardin check, which was pivotal in the Court of Appeals' opinion.

Section 1732, Title 28, United States Code, provides for the admission into evidence of microfilm copies, and provides also that enlargements or facsimiles of microfilms are also made admissible:

> "... if the original reproduction is in existence and available for inspection under direction of the court ..." (28 U.S.C. §1732)

"Count" Exhibits 1, 39 and 40, and Exhibit 23, were all at once enlargements of original reproductions and facsimiles of original reproductions. And not one of the original reproductions (microfilms) from which they were taken was shown either to be in existence or available for inspection under direction of the court as the statute requires.

FBI agent Nehrbass, the government witness who claimed to have made the reproductions from Merchants Bank film said of exhibits 1, 23, 39 and 40:

Exhibit 1—that he made it from a microfilm *which he could not identify* (Appellants' Appendix 49).

Exhibit 23—that he made it from a bank film *which was not in court* (Appellants' Appendix 49).

Exhibits 39 and 40—that he made them from film *he could not find and did not have* (Appellants' Appendix 50).

In overruling appellants' objection to this evidence on the ground that insufficient foundation had been laid for its introduction, the trial judge sanctioned the government's failure to comply with the statutory requirements governing the admission of such evidence. Yet the Court of Appeals refused to consider the question, consideration of which would have required reversal as to petitioner Grieco.

We are constrained to point out to your Honors that exhibit 23, the Bardin check as to which the government made flagrant misrepresentations in the Court of Appeals, as noted in a previous point, was an enlargement and facsimile of a bank microfilm which was not even in court, according to the F.B.I. agent (Appellants' Appendix 49). Yet the agent's statement that he made exhibit 23 from a film in the Merchants Bank is the only evidence in the entire record which remotely suggests that the original of exhibit 23 was ever in the Merchants Bank. Thus, this Court will again observe the flagrant imposition by the prosecution in falsely claiming to the Court of Appeals that Exhibit 23 bears a Merchants Bank endorsement upon it. (Compare Government's "Chronological List," p. 1, with Exhibit 23, Exhibits, Vol. 1, p. 23)

We respectfully urge that where the Court of Appeals has declined to rule upon matters brought before it, which matters have been preserved by proper objection in the trial court (Appellants' Appendix 159) the Court of Appeals has deprived an appellant of his right to review and has so far departed the usual course of judicial proceedings as to require the supervisory intervention of this court.

IV.

Evidence of no probative value was introduced by the government solely for its inflammatory value. The Court of Appeals declined review.

FBI Agent Jossy testified to a conversation with Grieco on November 8, 1956, which the government said would tend to prove the first six counts of the indictment (Appellants' Appendix 130).

Jossy said he asked Grieco about some checks, their origin, and if he had cashed them. Grieco replied he did not know of their origin, had cashed them, but had no other knowledge (Appellants' Appendix 131-132). Jossy said he described the checks to Grieco, but did not have them with him (Appellants' Appendix 133).

Innocent enough. An FBI agent asked a citizen if he recalled a check transaction and the citizen replied he did not. So very innocent in fact, as to prove nothing and to be thoroughly irrelevant.

The government was not content. Jossy was then asked on direct examination what checks he was investigating (Appellants' Appendix 130) and the witness replied, over objection:

> "These checks were drawn on the Bankers Trust Company, DesMoines, Iowa, and they were signed W. E. Neibel. They were forged checks which had been cashed in Chicago and had found their way back to DesMoines, and had then bounced back to Chicago again."

The defense motion for mistrial was denied (Appellants' Appendix 131).

This court will note that Jossy's testimony as to a forgery constituted secondary evidence of a hearsay conclusion. Further, neither Neibel nor the bank were mentioned in the rest of the record, nor does it appear that the Neibel check was remotely connected to the indictment. Even if the facts had been presented first-hand and in proper form, it would not have proved wrongdoing by Grieco.

What then, was the purpose of this testimony?

Why it proved, according to the government, that Grieco was warned in 1956 that he was dealing in forged checks.

We do not read into the record sinister implications which are unwarranted. The prosecutor argued to the jury that Jossy's evidence proved that Grieco knew that he was handling questionable checks, and that Grieco thus wilfully negotiated the checks as to which he was convicted after Jossy had talked to him on November 8, 1956 (Appellants' Appendix 163).

The poignancy of the error is best understood in terms of the failure of the government's proof of notice to Grieco of infirmities in instruments he or Shopping Center accepted for cashing. We have above demonstrated that no check went through Shopping Center or Grieco after Merchants Bank sent notice of the return of a bad check. Thus, the Jossy testimony stands alone in the entire record as an effort to show that Grieco had notice of a bad check going through Shopping Center, yet permitted other bad checks to follow.

Evidence as to matters in the general field of the charged offense, but not shown to be connected with the case on trial degrades a defendant in the eyes of the jury, and it is aggravated by an improper argument based upon it. See *Templeton* v. *United States*, 151 F. 2d 706, 707. The obvious intent of the Jossy testimony was to create in the minds of the jurors a belief that Grieco dealt in forged checks. The government merely suggested wrongdoing without proof of it. It was designedly prejudicial. It was not shown to have any factual basis whatever. Exactly the kind of thing, in short, that was fatal to a fair trial. *Tourbin* v. *United States*, 93 F. 2d 861, 868-9 (1938). It was the very sort of influence recognized as likely to deflect a jury from its proper path. *Blumberg* v. *United States*, 222 F. 2d, 496, 501.

We respectfully submit that the Court of Appeals ought properly to have considered the point raised in Grieco's brief, pp. 61-67. By failing even to consider the question, the Court of Appeals has sanctioned a departure from the accepted and usual course of judicial proceedings, calling for the exercise of this court's supervisory powers.

V.

Failure to instruction as to essential elements of the interstate transportation offenses.

When the trial judge instructed the jury as to the interstate transportation offenses as to which petitioner was sentenced to a term of ten years, he failed to instruct as to the element of knowledge, before criminal liability could attach to the interstate transportation of altered securities.

While codefendants were charged with interstate transportation of falsely made and forged checks, petitioner Grieco was charged of interstate transportation of falsely *altered* securities (Appellants' Appendix 38-39).

No effort of any kind was made to explain the offense, as would appear to be necessary to avoid "plain error" under *Screws* v. *United States*, 325 U.S. 91, 107.

The totality of his charge as to those counts, after summarizing the indictment, consisted in his reading from the basic law, 28 United States Code, Section 2314, providing in relevant part that:

> "... whoever with unlawful or fraudulent intent transports in interstate or foreign commerce any falsely made, forged, altered or counterfeited securities, knowing the same to have been falsely made, *forged, altered or counterfeited* ... shall be punished" (Emphasis supplied).

In reading the instruction to the jury (Appellants' Appendix 172) the trial judge left out the italicized words above. Accordingly, the jury did not get the "primary law" deemed by *United States* v. *Malfi*, 264 F. 2d 147, to be requisite to a proper charge to the jury.

As the instruction was read to the jury, knowledge of the character of the instruments was limited to those instruments which were falsely *made*. Yet petitioner Grieco was charged on "altered" checks. As amply appears from other portions of this petition and from the opinion of the Court of Appeals, the primary question as to Grieco was whether or not he knew of the character of the instruments that passed through his accounts. The instruction of the trial court effectively directed a verdict of guilty against him, for that instruction required a finding of guilty if, and only if, the instruments were altered prior to transportation. Grieco's knowledge of that alteration was deleted as an element of the offense.

The Court of Appeals held that the trial court merely omitted the word "altered" at one place and that other instructions explained the offense and prevented error. The only other instruction consisted in the court's summarizing the indictment to the jury.

Thus, while the jury was advised that the indictment *alleged* that the defendants transported securities knowing them to have been *altered*. (Appellants' Appendix 167) the jury was not instructed that knowledge was an ingredient without which the crime was unproved, save in the case of *falsely made* securities, *i.e.*, forgeries. *Martenet* v. *United States*, 216 F. 2d 760, 763.

CONCLUSION

We respectfully submit that in addition to having been deprived of a fair trial by almost any standards, and in addition to having been subjected to studied and calculated improprieties by the prosecution, both in the trial of the cause and upon appeal, and by virtue of the failure of the Court of Appeals to review serious questions brought before it; petitioner Grieco has been denied both a fair trial, his right to review, and due process of law. We respectfully submit that this petition for a writ of certiorari should be granted to the end that his several rights be confirmed in him.

Respectfully submitted.

FRANK W. OLIVER
Attorney for Petitioner

APPENDIX A.

In the

United States Court of Appeals

For the Seventh Circuit

No. 13094 SEPTEMBER TERM, 1961 JANUARY SESSION, 1962

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DAVID DORAN, DOMINICK ABBRESCIA, JULIUS GRIECO, and JOSEPH A. LoCELSO,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

January 11, 1962

Before SCHNACKENBERG, KNOCH and KILEY, *Circuit Judges.*

KILEY, *Circuit Judge.* The defendants Abbrescia, Doran, and Grieco have appealed from judgments on verdicts finding them guilty of conspiracy to use the mails in a scheme to defraud[1] and of unlawfully causing the trans-

[1] 18 U.S.C. §1341. Frauds and swindles. Whoever, having devised or intending to devise any scheme * * * to defraud, or for obtaining money * * * by means of false or fraudulent pretenses, representations, * * * or procure for unlawful use any counterfeit or spurious * * * security * * *, for the purpose of executing such scheme * * * or attempting so to do, places in any * * * authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department * * * or knowingly causes to be delivered by mail according to the direction thereon * * * any such matter or thing shall be fined not more than $1,000 or imprisoned not more than five years, or both.

portation in interstate commerce of forged or falsely altered securities.[2] LoCelso appeals from the judgment on the verdict finding him guilty of the conspiracy. Abbrescia was sentenced to prison for ten years, Doran for twenty-five years, Grieco for fifteen years, and LoCelso for two years.

There is ample proof of the unlawful scheme in detail: Cab drivers would seek out nightlife-bound visitors in Chicago and drive them to the Show Lounge. There they would be drawn into the net of an unlawful scheme by companionable female employees of the Lounge. The unlawful aim of these companions was to exhaust the cash reserves of the victims and aid in inducing, as quickly as possible, drunkenness by means of frequent or spiked drinks. Once out of cash, the victims were induced to sign checks already "made." Once written, the checks were used as models for tracing forged copies. The copies were then used in various ruses to induce the writing of additional or substitute checks. First endorsements were generally fictitious to give the appearance of genuineness and to conceal the culprits. The checks were negotiated to persons like Grieco, and institutions like the 24-hour Shopping Center, having bank accounts. The checks were deposited in the accounts and thus placed in channels which led to the mails and eventually to the drawee banks in Illinois and other states.

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[2] 18 U.S.C. §2314. Transportation of stolen goods, securities, monies, or articles used in counterfeiting.

* * *

Whoever with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered or counterfeited securities, knowing the same to have been falsely made, forged, altered, or counterfeited; * * *

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

LoCelso was a cab driver; Grieco owner of the 24-hour Shopping Center, whose bank account and his own were at the Merchants National Bank in Chicago; Abbrescia was manager of the Lounge and Doran his assistant.[3] They were convicted under the conspiracy Counts One, Two, and Six. None of them testified at the trial.

Abbrescia and Grieco were sentenced to five years, and LoCelso to two years, on each count, the sentences to run concurrently. Doran was sentenced to five years on each count, the sentences to be served consecutively.

The defendants claim that the evidence does not support the jury's verdicts as to these counts.

The first question is, therefore, whether there is substantial evidence, taking the view most favorable to the Government, to support the verdicts. *Glasser* v. *United States*, 315 U.S. 60, 80 (1941); *United States* v. *Maroy*, 7 Cir., 248 F. 2d 663, 665, cert. denied, 355 U.S. 931 (1957).

The evidence and inferences favorable to the Government, *United States* v. *Green*, 7 Cir., 246 F. 2d 155, 157, cert. denied, 355 U.S. 871 (1957), in proof of defendants' participation in the conspiracy are: LoCelso was one of the cab drivers who brought victims to the Show Lounge. He shared in the division of a percentage of the proceeds of the unlawful conspiracy. He would "half drag and half stagger" the victims to a cab for return to their hotel or "some place." He drove victim McDonald to the Show Lounge, presented him to Abbrescia, and McDonald was defrauded. He also drove victim Siehl to the

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[3] Defendants Harris and Schulman have not appealed. DiDomenico died pending trial, and Korbos was dismissed before trial.

Lounge and later to a brothel. He received a "gratuity" from Siehl of a $350 check which he deposited with a cab company credit union and later withdrew.

Also: Grieco owned the 24-hour Shopping Center and the Show Lounge. The first fraudulent check taken was of victim Bardin, dated September 21, 1956, drawn on a North Carolina bank. It was endorsed by Shopping Center and deposited in its account with Merchants National Bank of Chicago, where Grieco also had his personal account No. 20284. The check was not paid by the drawee and was returned "Payment Refused Amount Altered." Merchants National debited Shopping Center's account accordingly and notified it of the dishonor of the Bardin check.

And: Subsequently, victim Wyman's check, dated December 4, 1956, subject of Count One, was taken. It was "made" in printing similar to Doran's and drawn against the Goodwine State Bank of Potomac, Illinois. It bears the endorsements "Jack Johnson: Shopping Center: J. Grieco, 2946 W. Madison: Merchants." Grieco wrote his endorsement. The check was received by the Goodwine Bank and returned dishonored. It had not been put through a "bad check" detecting device that Shopping Center had had installed which photographs checks and presenters of checks. The device was installed under a contract indemnifying Shopping Center against loss from "bad checks." The contract required all Shopping Center's checks to be processed.

The jury could reasonably conclude from the evidence and inferences in the record that Abbrescia and LoCelso were members of the unlawful scheme of which Wyman was a victim; and that Doran "made" the fraudulent Wyman check and that the first endorser was fictitious.

Once shown to be a part of the conspiracy, Grieco is responsible "for all that may be or has been done." *Poliafico v. United States*, 6 Cir., 237 F. 2d 97, 104; cert. denied, 352 U.S. 1025 (1956). His participation need not have been shown by direct evidence. *Ibid.* Since a check drawn on a New Jersey bank was returned dishonored in eighteen days, the jury could reasonably infer that the Bardin check was returned from the North Carolina bank, and Shopping Center notified, within the eighty one days before the Wyman check was written. And it could conclude that Grieco, as owner of the Shopping Center, knew of notice of the returned Bardin check and with that guilty knowledge endorsed the Wyman check.

Venue was proved with respect to the Wyman check. It was made in Chicago, deposited in a conspirator's account in Chicago, mailed in Chicago and returned in the mail to Chicago. There was proof of defendants' mailing the check. Evidence of the ordinary course of banking business and Post Office Department customs was substantial proof of the mailing. *Decker v. United States*, 4 Cir., 140 F. 2d 378, 379, cert. denied, 321 U.S. 792 (1944), and Grieco's business experience and consequent knowledge of ordinary banking practice was enough to show he caused the mailing. *United States v. Sheridan*, 329 U.S. 379, 391 (1946).

The verdict was justified on Count One. Because their sentences on Counts One, Two and Six are concurrent and the verdict against Abbrescia, Grieco and LoCelso is justified on Count One, we need not consider the other two counts against them. *Lawn v. United States*, 355 U.S. 339, 359 (1958); *Roviaro v. United States*, 353 U.S. 53, 59 n. 6 (1956); *United States v. Sheridan*, 329 U.S. 379, 381 (1946).

Count Two involved a check of H. L. Smith. There was comparative evidence from which the jury could find that Doran, who wrote the victim Bynum's check (subject of Count Thirty-nine), also wrote the Smith check. Count Six involved a copy of a collection form representing a check of victim Garland, drawn by the "manager" of the Lounge. There was evidence that the check involved in this count was presented by Doran to a currency exchange for collection, that at the time he represented that it was from the Lounge, and expected the concealment of this fact. We conclude that the evidence and inferences support the verdicts against Doran on Counts Two and Six as well as on Count One.

Abbrescia, Doran and Grieco were each convicted on substantive Counts Thirty-nine and Forty. Grieco was sentenced to ten years' imprisonment, Abbrescia to five years, and Doran to ten years, on each count, the sentences to run concurrently.

Count Thirty-nine charges Abbrescia, Doran and Grieco caused a falsely altered check of victim Bynum to be transported in interstate commerce with fraudulent intent, knowing it to have been falsely altered.

Bynum testified that he signed a check on the First National Bank of Hudson, Ohio for $25.00 and that it had been raised to $125.00. There was some contrariety in this witness's testimony with respect to the details of what transpired the night the check was signed. This is understandable in light of the testimony of the scheme. We think, however, there is sufficient evidence, including the check itself, to show that the check was falsely altered.

There is evidence from which the jury could reasonably infer that Doran printed the Bynum check, Exhibit 39. It bears the endorsements "Dominick Abbrescia" and "J.

Grieco 20284." It also bears the endorsements of the Merchants National Bank and Federal Reserve Bank of Chicago. There is evidence of fingerprints and comparisons of handwriting from which the jury could reasonably infer that Abbrescia wrote his endorsement, and from comparison of handwriting that Grieco wrote his. There is evidence from which the jury could reasonably infer that Abbrescia, Doran and Grieco caused the check to be transported from Chicago, Illinois to Hudson, Ohio.

This substantial evidence supports their convictions on Count Thirty-nine. We need not, therefore, consider Count Forty, since the sentences are concurrent. *Lawn* v. *United States*, 355 U.S. 339, 359 (1958); *Roviaro* v. *United States*, 353 U.S. 53, 59 n. 6 (1956); *United States* v. *Sheridan*, 329 U.S. 379, 381 (1946).

This evidence does not include statements of Grieco's co-conspirators and his conviction does not offend the rules in *Krulewitch* v. *United States*, 336 U.S. 440 (1959). He was charged as a principal in Count Thirty-nine. The jury could reasonably have inferred that Grieco, when he endorsed the Bynum check, knew it was falsely altered, would be put in the mail and be forwarded by Merchants National Bank in interstate commerce to the drawee bank. These would be sufficient to support the finding that he "caused" the mailing, *United States* v. *Sheridan*, 329 U.S. 379, 391 (1946), citing *Kann* v. *United States*, 323 U.S. 88, 93 (1944), and was a principal in the unlawful enterprise.

No error was committed in the giving of instructions. The facts here are different from those in *Pinkerton* v. *United States*, 328 U.S. 640 (1946) and the instruction there is inapplicable here. Grieco was indicted in Count Thirty-nine as principal. And although the trial court here omitted the word "altered" at one place in reading the

definition of the offense in Count Thirty-nine, other instructions explained the offense and prevented error.

We find no merit in the contention that Abbrescia and Doran were denied a fair trial. The testimony that Doran was arrested in a brothel was neutralized by the abundance of kindred testimony. There was evidence seized in the brothel, and no showing that it was not seized in a search incidental to a lawful arrest. We see no error in its admission.

There is no ground for complaint about notations on Exhibit 961b.[1] Defendants stipulated with respect to it and had an opportunity to inspect it with other exhibits, and no objection was made to its going to the jury.

We have discussed the points that need consideration. No prejudicial error is shown. There is substantial evidence to support the verdicts of guilty on conspiracy Counts One, Two, Six, and substantive Count Thirty-nine.

For the reasons given, the judgment is AFFIRMED.

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[1] Exhibits 961a and 961b are photographs of the reverse sides, stapled together, of a standard FBI fingerprint form. Notations on 961b included "Charge or Offense * * * ITSP & Mail Fraud," "Send Copy U. S. Probation Office," and "Wanted by Bureau." 961a was offered to prove Abbrescia's handling of fraudulent checks. 961b was not offered.

APPENDIX B

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the Constitution of the United States provides in pertinent part:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . ."

The Sixth Amendment to the Constitution of the United States provides in pertinent part:

> "In all criminal prosecutions the accused shall enjoy the right to . . . be informed of the nature and cause of the accusation . . ."

Section 371, Title 18, U. S. Code provides in pertinent part:

> "If two or more persons conspire . . . to commit any offense against the United States . . . and one or more of such persons do any act to effect the object of the conspiracy, each shall be . . . [punished]".

Section 1341, Title 18, United States Code provides in pertinent part:

> "Whoever, having devised or intending to devise any scheme or artifice to defraud . . . for the purpose of executing such scheme . . . places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department . . . or knowingly causes to be delivered by mail . . . any such matter or thing, shall be fined . . . or imprisoned not more than five years, or both."

Section 2314, Title 18, United States Code provides in pertinent part:

. . .

"Whoever, with unlawful or fraudulent intent, transports in interstate . . . commerce any falsely made, forged, altered, or counterfeited securities, knowing the same to have been falsely made, forged, altered, or counterfeited . . .

"Shall be fined . . . or imprisoned not more than ten years, or both."

Section 1732, Title 28, United States Code provides in pertinent part:

. . .

"(b) If any business . . . in the regular course of business or activity has kept or recorded any . . . print [or] representation . . . of any act, transaction, occurrence, or event, and in the regular course of business has caused any or all of the same to be recorded, copied, or reproduced by any photographic, photostatic, microfilm, . . . or other process which accurately produces or forms a durable medium for so reproducing the original, the original may be destroyed. . . . Such reproduction, when satisfactorily identified, is as admissible in evidence as the original itself . . . and an enlargement or facsimile of such reproduction is likewise admissible in evidence if the original reproduction is in existence and available for inspection under direction of the court . . ."

Appendix C

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago 10, Illinois

I, KENNETH J. CARRICK, Clerk of the United States Court of Appeals for the Seventh Circuit, do hereby certify that the record heretofore prepared by the Clerk of this Court in this appeal on behalf of Defendant-Appellant Dominic Abbrescia and which was filed in the Supreme Court of the United States on February 10, 1962 in No. 716, October Term 1961, is the same record relied on by Defendant-Appellant Julius Grieco before this Court in:

Cause No. 13094

UNITED STATES OF AMERICA,

Plaintiff-Appellee.

vs.

DAVID DORAN, et al.,

Defendants-Appellants.

as the same remains upon the files and records of the United States Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Court of Appeals for the Seventh Circuit, at the City of Chicago, this eighteenth day of April A. D. 1962.

(Seal)

Kenneth J. Garrick

Clerk of the United States Court of Appeals for the Seventh Circuit.

Office Supreme Court, U.S.
FILED
JUN 15 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 956

JULIUS GRIECO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITIONER GRIECO'S REPLY TO GOVERNMENT'S BRIEF IN OPPOSITION

FRANK W. OLIVER
77 W. Washington Street
Chicago 2, Illinois
Attorney for Petitioner

UNITED STATES LAW PRINTING CO., CHICAGO 18, ILL. LAkeview 5-6581

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THE GOVERNMENT'S STATEMENT OF FACTS

Whatever the position of other petitioners, the government is mistaken in asserting as to Petitioner Grieco that "the sufficiency of the evidence is not challenged here." (Govt. Br. 5). Petitioner has taken the position throughout that the evidence was insufficient to sustain his conviction. He reasserts that position obliquely in his observation here that the government's own evidence, under its theory of the case, in fact established his innocence (Grieco Ptn. 26).

While we do not petition this Court to undertake an exhaustive factual examination, we would not leave the impression that we concede the sufficiency of the evidence.

REPLY TO GOVERNMENT'S ARGUMENT

The government misstates the theory of our argument as to the propriety of the admission of evidence on a conspiracy theory. We do not quarrel with the government's generalization that evidence may be admissible on a conspiracy theory, though no conspiracy is charged (Gov't. Br. 9).

Petitioner argued that matters were admitted into evidence against him which were not properly admissible, *whether or not* a conspiracy was charged (Grieco Ptn. 16-17). Included among those matters improperly admitted, were statements by alleged co-conspirators which the government concedes were made long after the conspiracy had come to an end. The government claims that it was really alright to permit the jury to use such statements against him, despite his absence when the statements were made, because none of the statements implicated *him* (Govt. Br. 10).

But no court has yet held that extra-judicial, post-conspiracy, post-indictment statements, made to FBI agents, are admissible against a man who is absent when they are made, merely because they do not contain his name.

The statements in question contained highly prejudicial matter, such as co-defendants' admissions that they had driven victims to houses of prostitution and that they had been required to accept checks from "hoodlums and racketeers" because of fear of such persons. Accordingly, the government cannot properly offer this Court its bland

assurance that the admission against Petitioner Grieco of these inadmissible matters was "harmless error" (G. Br. 10).

• • •

Petitioner Grieco complained of the admission into evidence against him of a conversation had with an FBI agent concerning a supposedly forged check. The government now admits ". . . that this check was not tied to the scheme." Nevertheless, says the government, the evidence was admissible to show ". . . guilty knowledge—*i. e.*, whether Grieco had handled the other checks innocently or as a 'fence' for false checks." (G. Br. 10).

Thus a *denial* of guilty knowledge as to a check, admittedly unrelated to the indictment, is urged by the government to be equivalent to *admission* of guilty knowledge of checks related to the indictment.

• • •

As to its failure to comply with the requirements of 28 U. S. C. 1732 (b), the government in effect responds that the original reproduction need not, as required by statute, be available for inspection under the direction of the court, provided a police officer is available to testify that he saw the original reproduction at an earlier date. Besides, says the government, the fact that the original was not in court does not show that it was not available (Gov't. Br. 10-11).

But it is for the proponent of evidence to qualify evidence for introduction. It is not for the other party to adduce proof that evidence is *not* admissible. The government argues that the objection to the evidence was "vague". The objection that no sufficient foundation had been laid for admission of the photographs into evidence was made because there was no sufficient foundation. If

that is your objection, those seem apt words in which to make it.

• • •

The government insists that the instructions as to limitations upon statements of co-defendants made out of the presence of one another were adequate (Govt. Br. 15). We have urged that the instruction in question is either meaningless or asserts the opposite from what the government suggests (Grieco Ptn. 15-16). But even assuming the instruction to be both technically correct and crystal clear, it was limited to Counts 1, 2, and 6. As to other counts, conviction of which added ten years to petitioner's sentence, no limitation was placed upon the use to be made of statements of co-defendants out of his presence. Indeed, the trial judge earlier admonished the jury that all evidence might be considered as to petitioner (Appellants' Appendix 161).

• • •

At trial the judge constantly referred to conspiracy counts which didn't exist, and the Court of Appeals stated it was affirming convictions of conspiracy. Hence petitioner's question to this Court as to the propriety of trying and convicting him of an offense with which he was not charged.

The government answers that it has a retrospective ability to get inside the trial judge's head, so to speak, and to opine his purpose in referring to certain substantive counts as conspiracy counts (Govt. Br. 15). Less occultly, we advance the language used by the trial judge as his pronouncement that conspiracy was in fact charged in the indictment:

> "... on a conspiracy count, general testimony ... may be introduced ... but as to other counts the defense should be informed" (Appellants' Appendix 65).

"... Count No. 6 is a conspiracy count ... this is a conspiracy count ..." (Appellants' Appendix 81).

"... you have conspiracy counts here" (Appellants' Appendix 83).

"We have a conspiracy charge here. In the first six counts ... excluding 5, it is a part of the conspiracy charge ..." (Appellants' Appendix 95).

"... we have a conspiracy charge here." (Appellants' Appendix 99).

"If you go through it count by count and then come back to your conspiracy count ..." (Appellants' Appendix 145).

It seems plain as day that the trial judge believed there were conspiracy counts in the indictment. Because that is what the trial judge said. He did *not* say, as the government now claims, that he was merely invoking an evidentiary rule.

• • •

The government believes that it was proper, in the absence of any evidence, to represent to the trial judge and to the Court of Appeals that it had established fictitious first endorsements on the backs of checks. For the first time, the government argues there were inferences to that effect. It draws those inferences from the following facts (Gov't. Br. 17):

(a) That the checks were on out-of-town banks;

(b) payable to cash;

(c) written at the Show Lounge; and

(d) purported to pass through different persons before passing through petitioner's bank account.

To assert from the foregoing that first endorsers were fictitious is equivalent to asserting a rule of law to the effect that endorsements on all checks are presumed fictitious unless the contrary is shown. The government could avoid espousing both its pinchbeck logic and its embarrassing theory by candidly confessing there is not a speck of evidence in the entire record which remotely suggests that any endorsement on any check was fictitious.

The government repeats a statement it made in the Court of Appeals, to the effect that the "handwriting expert had not . . . testified [that the handwriting on Bardin check, Exhibit 23, was similar to Doran's]" (Gov't. Br. 17). But the government went a good deal further in the trial court stating, in dismissing Count 23 to which the check purported to relate, that the handwriting expert *did not make out the check as a Doran check* (original Transcript of Proceedings, page 2287). Thus we urge again that the government knew by its own expert that it could not truthfully claim in the Court of Appeals that the check was a Doran check.

The government only concedes that the bank endorsements on Exhibit 23 are "indistinct" (Govt. Br. 17). But that the jury was justified in accepting the FBI agent's testimony that he made a photograph of the check from microfilm at the bank. Our argument, however, went to the falsification by the government in its "list of exhibits" that the check in fact bore the endorsements in question. In fact the government could not truthfully make that claim, but was willing to make it in the Court of Appeals in order improperly to prevail there.

The government's apology for tampering with the record in the Court of Appeals takes the form of advising this Court just how harmless its effort was (Gov't. Br. 12). We would suggest that the failure of the law to draw

careful distinctions between harmful record tampering and harmless record tampering, does not constitute a blemish.

The government's willingness in this case coldly and designedly to have fabricated its way to conviction and affirmance cannot be excused as a manifestation of zealous advocacy. The government's treatment of Exhibit 38 in the Court of Appeals is instructive. It is discussed at length in Grieco's Court of Appeals Reply Brief, pp. 25-26. In short, to obtain affirmance of one count, the government there advised the court that the face of Exhibit 38 disclosed certain words were capitalized, others not, thus proving alteration of the count exhibit. In fact, the lettering was not at all as represented. The misrepresentation was apparently chanced in the hope that such details would not be checked.

* * *

We concur in the government's view that a Court of Appeals need not set forth its reasons for rejecting a particular argument. But we believe that an argument not plainly frivolous deserves the court's consideration before that argument is rejected. Here the Court of Appeals said that it "had discussed the points that need consideration" (Grieco Ptn. Appendix A., p. 8). From which we infer that the points not discussed by the court were not considered. In view of the fact that the court's consideration of those points would have required reversal, the court erred in not considering them.

CONCLUSION.

We respectfully submit that for the foregoing reasons and for those stated in our Petition for Certiorari, certiorari should be granted here.

Respectfully submitted,

FRANK W. OLIVER
Attorney for Petitioner